SYKT. BUNGA RAYA-TIMOR JAUH SDN. BHD. & ANOR.

v.

TRACTORS (M) BHD.

PRIVY COUNCIL
LORD FRASER OF TULLYBELTON
LORD BRIDGE OF HARWICH
LORD BRANDON OF OAKBROOK
LORD BRIGHTMAN
JOHN MEGAW
[APPEAL NO. 11 OF 1981]
27 JANUARY 1983

CONTRACT: *Claim for payment of arrears of rental and interest - Application for summary judgment under O. 14 Rules of the High Court 1980 - Whether there was triable issue - Nature of agreement - Effect of letter granting option to purchase.*

The respondents and the first appellants entered into a number of written agreements, called "Equipment Lease Agreements". The respondents were given an option to purchase by letter. On the first appellants later ceasing to make payments, the respondents got back possession of the machines and sued for payment of arrears of rental, with interest and other charges. They applied for summary judgment under O. 14 of the Rules of the High Court. The application was dismissed by the Senior Assistant Registrar. The High Court however granted leave to sign final judgment for arrears on all the machines. The Federal Court confirmed the judgment in part but granted leave to defend regarding arrears under the first three agreements, which, they held, were covered by the letter granting an option to purchase some of the machines.

Held:

[1] It was arguable that the letter formed part of all the agreements and the option to purchase referred to all the machines.

[2] Therefore, as it was also arguable that all the agreements were of the same character, that is hire-purchase agreements, there was in fact a triable issue.

[3] Leave to defend in respect of all the agreements should be granted to the appellants.

[Appeal to be allowed.]

Legislation referred to:
Hire Purchase Act 1967, s. 6
Rules of the High Court 1980, O. 14

JUDGMENT

Lord Fraser:

This is an appeal against an order of the Federal Court of Malaysia (Raja Azlan Shah CJ Malaya, Chang Min Tat and Syed Othman FJJ), which confirmed in part a judgment of Harun Hashim J in an O. 14 application by the respondents. The order of the Federal Court allowed the respondents to sign final judgment against the appellants for arrears of hire and other sums due under some of a number of agreements between the respondents and the first appellants.

The respondents and the first appellants entered into nine agreements in writing, by which the respondents let to the first appellants nine tractors. The agreements were called Equipment Lease Agreements. The respondents were described therein as the lessors, and the first appellants as the lessees. The agreements were all on printed forms, in identical terms, with the names of the parties and the dates typed in. Each agreement had an appendix on a printed form in which the description of the particular machine and the rent, the dates and other details were completed in type or manuscript. The agreements were, on their face, leasing agreements with no element of sale. The question, and the only question, for decision by the Board now is whether there is a triable issue as to whether the agreements were what they appear to be, or were, in reality, hire purchase agreements. If they were hire purchase agreements, further questions will arise at a later stage of the proceedings as to whether the machines to which the agreements relate are goods of one of the classes specified in the First Schedule to the Hire Purchase Act 1967 (Revised 1978) of Malaysia and, if so, whether the agreements are unenforceable having regard to certain sections of that Act, including s. 6.

The first appellants are a wholly owned subsidiary of the second appellants, which entered into nine agreements called guarantees and indemnities with the respondents, guaranteeing due observance and performance by the first appellants of the terms and conditions of the leasing agreements. No separate question about the guarantee agreements arises at the present stage.

There were in all nine agreements between the first appellants and the respondents. The first three were dated 2 September 1975 and were to last for thirty months from 28 August 1975. During that period a monthly rental was payable by the lessees. In one case the rental was RM9,902.50 per month. In the other two cases (which related to another type of machine) it was RM7,480 per month. Three more agreements were dated 25 May 1976, and were to last for thirty months from that date, with rental payments of RM7,480 per month in each case. the last three agreements were dated 5 June 1976 and were to last for thirty months from that date, again with rental payments of RM7,480 per month in each case. All nine agreements were later varied, each by a separate agreement dated 23 June 1977, which will be considered later. The first appellants paid the rentals under all the agreements until 31 March 1977, but from 1 April 1977 they ceased to make any payments. The respondents, in purported exercise of their powers under the agreements, re-took possession of eight of the machines between 27 November 1977 and 6 December 1977. The ninth machine was voluntarily returned to them by the first appellants on 29 January 1978.

The respondents are now suing for payment of the arrears of rental, with interest and certain other charges. They issued a specially endorsed writ on 8 May 1978, amended on 5 June 1978, and on 29 July 1978 they filed a summons for summary judgment under O. 14 of the Malaysian Rules of the High Court in respect of all their claims. The summons was supported by an affidavit of their credit control manager in which he stated his belief that there was no defence to the action.

The summons and supporting affidavit came before the Senior Assistant Registrar of the High Court at Kuala Lumpur. When it was before the Senior Assistant Registrar, the application was restricted to the claims for arrears of rental and interest, with costs, and the plaintiffs (now respondents) agreed that in respect of the other items claimed a full hearing was necessary. The Senior Assistant Registrar dismissed the application on the ground that it raised triable issues. On appeal, Harun Hashim J set aside the Registrar's order and ordered that the respondents should be at liberty to sign final judgment against the appellants for the arrears of rental on all nine machines, with interest up to the date of repossession of the machines. The Federal Court on appeal came to a decision intermediate between those of the Registrar and of the learned Judge. It varied the Judge's order by giving leave to the appellants to defend in respect of arrears of rental and interest under the first three agreements (those dated 2 September 1975) but it confirmed the Judge's decision so far as it applied to arrears of rental and interest under the other six agreements. The Federal Court also allowed the respondents to sign final judgment in respect of two other items in their claim, but it appears that the decision on those items may have been given *per incuriam.*

The application for summary judgment was resisted on the ground *inter alia* that the agreements were in reality hire purchase agreements. In support of that contention the first appellants (defendants) relied on a letter dated 21 August 1975 from the respondents to them. Koh Kim Chai, who is a director of both appellants, swore an affidavit dated 11 September 1978 in which he stated his belief that they had a good defence. In the lower Courts the respondents argued that the letter of 21 August 1975 was not admissible in evidence. The Federal Court held that it was at least arguable that the letter should be admitted on the view that the entire agreement between the parties consisted of the agreements as varied by the letter, and that the two documents should in each case be read together. They considered that the letter could only relate to the first three agreements, and it was for that reason that leave to defend was given only in respect of those agreements. Before the Board Counsel for the respondents conceded that, for the purpose of considering whether there was an arguable defence, the Board could look at the letter, and no question now arises on that point.

The Equipment Leasing Agreements, as already mentioned, have all the appearance of being leases and nothing more. The only parts of them to which it is necessary to refer are clause 19 and 20. Clause 19(i) of each agreement makes the ordinary provision that, upon the expiration or other determination of the lease, the lessee shall deliver the machine in a good state of repair to the lessor. That provision is entirely consistent with the agreement being purely a lease. Clause 20, which is deleted from each of the printed forms, provided for the lessee to have an option to renew the lease on the expiration of its original term. The fact that this clause has been deleted appears to their Lordships to be more consistent with the agreements having been intended to take effect as agreements for hire purchase than for hiring alone. But the most significant feature of the agreements is in the appendix to each of them. The appendix gives details of the "total rent" and of the monthly instalments by which it is to be paid, and it then contains the following statement, which is

typed in as an addition to the printed form, "Residual Value RM1". Counsel for the appellants founded strongly on that provision as indicating that the parties intended the lessee to have the option of purchasing the machine, at the end of the period of hire, for the nominal price of RM1. Their Lordships consider that that is at least a possible inference, although it is not one that they would regard as justified if the provision as to residual value stood alone.

But it does not. The other main basis for the appellants' case is in the letter of 21 August 1975. With that letter the respondents enclosed the first three agreements, which were executed by the first appellants a few days later, on 2 September 1975. The relevant portions of the letter are as follows:

> Dear Sirs,
>
> Lease Agreements
> for Caterpillar Equipment
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> Further to your discussion with the writer and our General Manager Sales, we wish to confirm the following arrangements:
>
> 1. We attach herewith our equipment lease agreements for two (2) units Cat D6C DD and one (1) Unit Cat D7F DD all complete with Carco Winches. The details and terms of the lease are as per the agreements attached. We will deliver the above units by the 27/28 August 1975.
>
> ...
>
> 4. We will hold the price of either the Cat D6C or the Cat D7F whichever you decide to purchase up till March, 1976 in consideration of your desire to purchase another seven or eight units by then.
>
> 5. As agreed, the option to purchase for the machines will be exercised by [the first appellants] or its assignees.
>
> We trust that the arrangements confirm our discussion and we wish to assure you of our best services and attention at all times.

It will be observed that the letter bears to "confirm" arrangements, which presumably had been made orally, although there is no evidence on that matter. The most important paragraphs of the letter are paras. 4 and 5. Paragraph 4 clearly contemplates that the first appellants desire to "purchase" machines of either of the two types mentioned. Those were the types of machines to which the first three agreements related; one of the first three machines was type D7F and the other two were type D6C. The respondents undertook to "hold the price" until March 1976, which their Lordships understand to mean that they would not increase the price until that date. That promise was stated to be in consideration of the appellants' desire to "purchase" another seven or eight units by then. The price is not stated, but it is presumably the basic price included in the total rent stated in the appendix. It must be less than the total rent, as the latter sum will include an element of interest to allow for the fact that payment in full is postponed for thirty months. Paragraph 5 refers expressly to "the option to purchase for the machines". The precise significance of these paragraphs is not altogether clear, but in the opinion of their Lordships they provide a most significant background for the provision in the appendix of each of the leasing agreements as to residual value

for the machines. These two elements, the residual value and reference in para. 5 to the option to purchase, were the basis of the defence outlined by Koh Kim Chai in his affidavit of 11 September 1978, to the effect that the agreements were in fact agreements for hire purchase. The affidavit is somewhat lacking in particularity, and it unfortunately does not give a full explanation of the reasons for the various provisions in the agreements and the letter, but their Lordships are of the opinion that it gives just enough to show that a triable issue exists.

The Federal Court considered that it was arguable that the letter formed part of the total agreement relating to such machines as were referred to in paras. 4 and 5. But they took the view that the option to purchase which was given could only refer to the three machines covered by the first three agreements, which were enclosed with the letter, and that it could not refer to the subsequent leasings. Their Lordships agree that the letter is capable of being read as referring to an option to purchase the machines referred to in the first three agreements but they are of opinion that it is capable of referring also to the other six agreements. They consider that it might be regarded, not as a contractual document, in the sense of containing the actual terms of the contract between the parties, but rather as part of the background against which all nine agreements fall to be construed. Paragraph 4 refers to the purchase of "another seven or eight units" and it is in the opinion of their Lordships, arguable that that is a reference to the six machines which were eventually subjects of the later agreements. Indeed, having regard to the fact that in the appendix to each of nine agreements the residual value is stated at the same figure of RM1, it appears to be arguable that all nine agreements were of the same character, whatever it may have been. Accordingly their Lordships consider that the proper course is to give leave to the appellants to defend in respect of all nine agreements.

That opinion is reinforced by consideration of the variation agreements dated 23 June 1977. The schedule to each of these agreements states the total amount outstanding under the original Equipment Lease Agreement to which it relates, and after certain additions and deductions it brings out a new figure of total rental and a new monthly rental. In each case the new monthly rental (payable from 1 October 1976 until 1 September 1979) is lower than the original rental. In each case also the "residual value" is very much higher than the original amount of RM1. It would appear that a probable explanation of the varied figure is that, in consideration of payment of the total rental having been deferred, and of the reduction of the monthly instalments, the residual value has been increased, but that the parties still intended that the lessees were to have an option to purchase at the new residual value.

For these reasons their Lordships will advise His Majesty the Yang di-Pertuan Agong (1) that the appeal should be allowed, the orders of the Federal Court and the High Court set aside and the order of the Senior Assistant Registrar restored; (2) that the case be remitted to the Federal Court for that Court to make any orders that may be necessary as to further procedure in the light of their Lordship's judgment and (3) that the respondents pay to the appellants and the costs of these proceedings so far in the High Court and the Federal Court and of the appeal to this Board but that the costs of the proceedings before the Registrar be costs in the cause.

The proceedings will now revert to the position in which they stood immediately after the Registrar's decision on 3 November 1978. The only result of the respondents' persistence in seeking an order for summary judgment is that four years and much money have been wasted.

Also found at [1983] 1 CLJ 169